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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 92

AMERICAN EMPIRE INSURANCE COMPANY OF SOUTH DAKOTA, a South Dakota Corporation, on Behalf of Itself and All Other Insurance Companies Who Were Shareholders in the USAFORM Hail Pool; STUYVESANT INSURANCE COMPANY, a New York Corporation, on Behalf of Itself and All Other Insurance Companies Who Employed U. S. & Foreign Management, Ltd. and USAFORM Pan-American, Ltd. as Reinsurance Brokerage Agents; USAFORM Hail Pool, Inc., a Florida Corporation; U. S. & FOREIGN MANAGEMENT, LTD., a New York Corporation; U. S. & FOREIGN MANAGEMENT, INC., a Florida Corporation, BARBARA MURPHY, as Receiver for Each of said Corporations; USAFORM Pan-American, Ltd., a Delaware Corporation.

Petitioners,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland Corporation.

Respondent.

REPLY BRIEF OF PETITIONERS SEEKING A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OCTOBER TERM, 1968

No. 1339

AMERICAN EMPIRE INSURANCE COMPANY OF SOUTH DAKOTA, a South Dakota Corporation, on Behalf of Itself and All Other Insurance Companies Who Were Shareholders in the USAFORM Hail Pool; STUYVESANT INSURANCE COMPANY, a New York Corporation, on Behalf of Itself and All Other Insurance Companies Who Employed U. S. & Foreign Management, Ltd. and USAFORM Pan-American, Ltd. as Reinsurance Brokerage Agents; USAFORM Hail Pool, Inc., a Florida Corporation; U. S. & FOREIGN MANAGEMENT, LTD., a New York Corporation; U. S. & FOREIGN MANAGEMENT, INC., a Florida Corporation, BARBARA MURPHY, as Receiver for Each of said Corporations; USAFORM Pan-American, Ltd., a Delaware Corporation,

Petitioners,

vs.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland Corporation,

Respondent.

REPLY BRIEF OF PETITIONERS

This brief is directed to the argument first raised in Respondent's brief to this Court, that there is no special

and important reason under Rule 19 for granting writ of certiorari and specifically to Respondent's argument that the decision of the Court of Appeals for the Fifth Circuit is in accord with the law of Florida. To the contrary, we respectfully submit that there are compelling reasons for granting certiorari in the case at bar, particularly in light of the landmark decision of the Supreme Court of Florida in *Shingleton and Nationwide Mutual Insurance Company* v. *Bussey*, filed May 28, 1969.[1] This decision, announced since the filing of the Petition for Writ of Certiorari in this cause, clearly indicates that the Fifth Circuit decision herein is not only contrary to the general law of Florida, but also violates the Florida State Constitution.

In *Bussey*, the Florida Supreme Court held that the trial court erred in dismissing Nationwide Mutual Insurance Company as a party defendant in an action against its insured arising out of an automobile collision. The liability policy involved contained a "no-joinder" restriction which specified that the insurance company could not be joined as a defendant in any action against its insured. The injured plaintiff was simply a member of the general public, and her identity was not known to the insurer until the claim was filed. The Florida Supreme Court declared that "members of the

1 The best citation that we can furnish the Court at this time is as follows: *Frances Ruth Bennett Shingleton and Nationwide Mutual Insurance Company, an Ohio corporation, Petitioners,* v. *Elizabeth Reiff Bussey, Respondent.* In the Supreme Court of Florida, January Term, A.D. 1969, Case No. 37,636.

We will hereinafter refer to this case simply as *Bussey*. The Supreme Court of Florida filed its opinion in this case on May 28, 1969, and the Court has not yet disposed of the Petition for Rehearing that was filed. Obviously, *Bussey* has not yet been published in the Southern Reporter, but we have printed the case as an appendix to this brief. While a denial of the Petition for Rehearing in *Bussey* would appear to dictate reversal of the Fifth Circuit's judgment in the case at bar, a granting of the Petition for Rehearing would not suggest the opposite result.

public" are third party beneficiaries of liability insurance policies, and, as such, have a right of *direct action* against the insurer, voiding the express "no-joinder" restriction written in the insurance policy.

In the case at bar property belonging to the third party beneficiaries (A-9) was directly insured under the fidelity bond (R-64), the identity of the third party beneficiaries was specifically known to the insurer (R-60), and the insurance contract did not contain *any* specific "no-joinder" restriction (R-11). Obviously, the right of direct action against the insurer in our case is much stronger than in *Bussey*.

Early in the *Bussey* decision, the Florida Supreme Court announced its conclusion:

> "We conclude a direct cause of action now inures to a third party beneficiary against an insurer in motor vehicle liability insurance coverage cases as a product of the prevailing public policy of Florida.
>
> Public policy is a molding device available to the judicial process by which changing realities and the attending manifested rules of fair play may be incorporated into our corpus juris."

Casting aside "traditional notions" concerning "direct" vs. "incidental" benefits such as raised by Respondent herein, the Florida Court observed that:

> ". . . we are convinced that the time has arrived when the legal reasons advanced in favor of joinder and direct action against an insurer outweigh and preponderate over the traditional notions asserted to justify precluding an injured third party from enjoying such rights."

The Court went on to emphasize:

> "The unfettered right of a plaintiff to sue defendants jointly is so universal and essential to due process

> that it can rarely be curtailed or restricted by private contract between potential defendants. An insurer is free not to enter into a liability policy with an insured, but if it does so it cannot unreasonably circumscribe its potential liability under the contract by stipulating therein restraints upon the right of the third party beneficiary to sue directly an insurer contingently or secondarily liable and to join the insurer as a defendant in the action to determine the liability of the insured."

Of course, in the case at bar, there was no express "no-joinder" restriction contained in the insurance contract (R-11).

The Florida Supreme Court continued:

> "The insured and the insurer cannot constitutionally contract away or postpone the speedy and adequate remedy the law affords a third party, nor impose unusual limitations upon the latter's right to jointly sue adverse parties."

The above quoted language stands in sharp contrast to the assertion made by Respondent as to the Florida law concerning the right of a third party beneficiary to sue an insurer directly!

Summarizing, the Court said:

> "In any case, it seems anomalous to public policy to procedurally sanction and condone a situation where the ultimate beneficiary of policy proceeds is deprived by a provision in the policy of an open, speedy and realistic opportunity to pursue by due process his right of an adequate remedy at law jointly against the insured and insurer."

It is without dispute in the case at bar that the Pool Participants will be the ultimate beneficiaries of a recovery of insurance policy proceeds (R-124-127).

The Florida Supreme Court concluded with a statement that is both simple and wise:

> "If joinder is allowed initially, all the cards are on the table and all interrelated claims and defenses can be heard and adjudicated reciprocally among all parties and the plaintiff will have the same initial right as insurer now avails itself against plaintiff to protect his rights against the insurer. In this manner the interests of all the parties and the concomitant right to expeditiously litigate the same in concert are preserved."

Bussey furnishes a special and important reason under Rule 19 for granting the writ, a reason which is in addition to those suggested by our Petition for Writ of Certiorari.

RESPONDENT'S BRIEF

We do not think it necessary to reply specifically to the other points raised by Respondent's brief, except Respondent's statement on page 2 and page 7 (where Petitioners are accused of false and misleading statements) that no theft or liability has been proven. Passing over the conclusion of F & D's own investigator that "Clarke has gutted . . . these insured corporations" (R-253), we would point to Judge Wisdom's comment that:

> "At this stage of the litigation, of course, losses due to Clarke's dishonesty must be taken as 'proven'." (A-20).

Anyone possessing an elementary knowledge of the mechanics of litigation would concur with Judge Wisdom.

CONCLUSION

We would join the Respondent in citing to this Court *Wichita Royalty Company* v. *City National Bank of Wichita Falls,* 306 U.S. 103, 83 L.Ed. 515, where this Court said:

> "It was the duty of the federal court to apply the law of Texas as declared by its highest court."

And we would paraphrase Respondent's comment at page 5 of its brief, by saying that as Florida law *is* applicable and since the Court of Appeals failed to correctly apply the law, its decision *needs* to be reviewed by certiorari.

The power of this Court is co-extensive with all possible necessities insofar as litigation in the Federal Courts of Appeal is concerned, *Forsyth* v. *City of Hammond,* 166 U.S. 506, 17 S.Ct. 665, 41 L.Ed. 1095. We respectfully submit that in the interests of justice any one of three courses of action may be taken by this Court.

1. The Petition for Certiorari could and should be granted for the purpose of considering this case on its merits. Conflict with the law of Florida as expressed in many cases, including *Bussey,* has been suggested; there is conflict between the Eighth Circuit Court of Appeals and the Fifth Circuit Court of Appeals; there is conflict with the decisions of this Court. Rule 17(a), Federal Rules of Civil Procedure, was violated by the decision below.

2. The Petition for Writ of Certiorari could be granted for the express purpose of certifying the question to the Supreme Court of Florida in light of *Bussey.*

3. Without prejudice to any party, this case could be remanded to the Fifth Circuit Court of Appeals for reconsideration in light of *Bussey.*

Insurance is an important institution in America, and in the modern world. It is no longer merely a matter of private contract, but is clothed with a great public interest. The time has come for this Court to furnish judicial guidelines defining the requirements of due process of law in the resolution of disputes between insurer, insured, and third party claimants.

Respectfully submitted,

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